IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC84648**
	)	
KIMBER EDWARDS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION THREE
THE HONORABLE MARK D. SEIGEL, JUDGE

APPELLANT'S REPLY BRIEF

Janet M. Thompson, Mo.Bar No. 32260
Office of the State Public Defender
3402 Buttonwood
Columbia, MO 65201
(573) 882-9855 (telephone)
(573) 884-4921 (fax)
jthompso@mspd.state.mo.us (e-mail)

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement from the opening brief is incorporated by reference.

STATEMENT OF FACTS

The Statement of Facts from the opening brief is incorporated by reference. Rules 30.06(c) and 84.04 provide that a statement of facts "shall be a fair and concise statement of the facts relevant to the questions presented for determination *without argument*." (emphasis added). The Respondent argues Kimber "*voluntarily* agreed to go to the University City police station with them." (Resp.Br.at15) (emphasis added). Whether Kimber's having accompanied officers when they arrived *en masse* at his home at 3 a.m. was voluntary is a legal question for this Court.

POINTS RELIED ON

I. BATSON CHALLENGES IMPROPERLY DISALLOWED

The trial court clearly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #50—Ms. Evans, and #56—Mr. Burton, African-Americans, because the court's rulings denied them and Kimber equal protection and Kimber freedom from cruel and unusual punishment under U.S.Const.,Amends.8,14 and Mo.Const.,Art.I, §§2,21 in that defense counsel made a prima facie case of discrimination by the state and the state's explanations for its strikes of Evans and Burton were pretextual. The state's explanation for striking Ms. Evans—that she distrusts the system, the courts, and prosecutors because of the treatment of her relative—was pretextual since Veniremember Tincu was a similarly situated white person who the state did not move to strike. The state's statement that Tincu was not similarly situated because she was not dissatisfied with the criminal justice system's treatment of her relative was not supported by the record. The state's explanation for striking Mr. Burton—that he was a postal worker—was also pretextual since Mr. Burton's employment with the postal service is unrelated to this case and therefore the "postal worker" explanation is code for African-American. Further, the state's explanation that they strike postal workers because they are members of a bureaucracy is pretextual since they did not strike similarly situated white jurors who also work for bureaucracies—the City of Clayton and the federal government.

Batson v. Kentucky, 476 U.S. 79 (1986);

Purkett v. Elem, 514 U.S. 765 (1995);

State v. Butler, 731 S.W.2d 265 (Mo.App.,W.D.1987);

U.S. Const.,Amend.8,14;

Mo.Const.,Art.I,§§2,21.

II. VOIR DIRE UNREASONABLY RESTRICTED

The trial court abused its discretion in unduly restricting defense voir dire by precluding counsel from asking whether the jurors could seriously consider imposing a life without probation or parole sentence if the State proved that "Kimber Edwards and another killed his ex-wife, the mother of his child" because this ruling denied Kimber due process, a fair trial with a fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, by denying Kimber the ability to probe the jurors' views about this being the killing of "the mother of [Kimber's] child," Kimber could not explore a critical fact in the case and discover potential disqualifying bias. Since the state emphasized that Kimberly Cantrell was the mother of Kimber's child, Erica, throughout trial, Kimber suffered a real probability of injury.

Morgan v. Illinois, 504 U.S. 719 (1992);

State v. Clark, 981 S.W.2d 143 (Mo.banc1998);

State v. Baker, SC84507 (Mo.banc,4/1/03);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

III. KIMBER'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The trial court erred and clearly erred in overruling Kimber's motion to suppress statements and admitting those statements into evidence because these rulings denied Kimber due process, a fundamentally fair trial, the right to silence and non-incrimination and freedom from cruel and unusual punishment guaranteed by the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that Kimber was a suspect in Kimberly's death and was subjected to a custodial interrogation in the early morning of August 24, 2000. The interrogation was highly coercive, since the officers brought Kimber's wife and three children to the station that night; separated Kimber from his wife and his children; took fingerprints, shoeprints, hair samples and photographs of his wife and instituted proceedings to place custody of his daughter Erica in DFS, removing her permanently from Kimber's custody that night. Kimber's statements were obtained because of the coercive environment and were thus involuntary, since the officers threatened to bring his wife and remaining children back to jail for more questioning unless he agreed to tell them what they wanted to hear. Kimber's statements were also involuntary because he invoked his right to counsel once he was a suspect in this case, after the initial custodial interrogation, but before he made any statements and did not initiate the contacts with police officers who ultimately obtained his statements.

Berkemer v. McCarty, 468 U.S. 420 (1984);

State v. Taber, 73 S.W.3d 699 (Mo.App.,W.D.2002);

State v. Burge, 39 S.W.3d 497 (Mo.App.,S.D.2000);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),19,21.

IV. NON-TESTIFYING CO-DEFENDANT'S STATEMENTS ADMITTED

The trial court erred in admitting through Officers Whitley, Coleman, Gage and Siscel, the statements of Orthell Wilson, Kimber's non-testifying co-defendant who shot Kimberly Cantrell, and whose statements implicated Kimber and further erred in denying Kimber's request for instructions limiting the officers' testimony to explain their subsequent conduct and not for the truth of what Orthell told them because those rulings denied Kimber due process, the right to confront witnesses against him, a fundamentally fair trial and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, while the state asserted that the officers' testimony was intended to show "what they did next" it was solely introduced to show that Orthell had confessed to killing Kimberly and had implicated Kimber; the jury asked about Orthell's statements during deliberations, and, since Orthell did not testify, Kimber was denied the right to confront him and challenge his statements implicating Kimber in the crime.

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

V. REFUSAL TO GIVE NO-ADVERSE-INFERENCE INSTRUCTION

The trial court erred in refusing to give Instruction D, the no-adverse-inference instruction, patterned after MAI-Cr3d308.14, in penalty phase because this ruling denied Kimber due process, a fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination under U.S.Const., Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that, although Kimber testified in guilt phase, he did not testify in penalty phase and, when counsel requested that the court instruct the jury that it could not draw any adverse inference from Kimber's failure to testify, the court refused. The failure to give that instruction inescapably impressed on the jury's consciousness that Kimber had not testified and left it free to consider that fact in making its penalty phase decision.

State v. Mayes, 63 S.W.3d 615 (Mo.banc2002);

State v. Storey, 986 S.W.2d 462 (Mo.banc1999);

Carter v. Kentucky, 450 U.S. 288 (1981);

U.S. Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),19,21.

VII. COMMENTS ON FAILURE TO PLEAD GUILTY

The trial court erred and abused its discretion in overruling Kimber's objections to repeated statements about Kimber's failure to plead guilty to criminal non-support because those rulings denied Kimber's rights to due process, to be tried solely for the pending charge, a fair trial and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I, §§10,18(a),21 in that the comments encouraged the jury to convict Kimber of first degree murder based on his failure to plead guilty to another offense, and thus used his exercise of his constitutional rights in another case to suggest guilt in both cases.

State v. Bannister, 680 S.W.2d 141 (Mo.banc1984);

Griffin v. California, 380 U.S. 609 (1965);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

VIII. FAILURE TO DISCLOSE DEFENDANT'S STATEMENT

The trial court abused its discretion in denying the defense request for a mistrial when Detective Brady testified that Kimber told him "it's not his business. He had nothing to do with it" because this ruling denied Kimber due process, a fair trial, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I, §§10,18(a),21 and violated Rule 25.03 in that the state failed to disclose this statement, despite discovery requests under Rule 25 and §565.005RSMo, and the state used the statement to bolster its case against Kimber and portray Kimber as uncaring and unremorseful about Kimberly's death.

State v. Rayner, 549 S.W.2d 128 (Mo.App.,W.D.1977);

Kansas City v. Peret, 574 S.W.2d 443 (Mo.App.,W.D.1978);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21;

Rule 25.

XII. DISPROPORTIONATE SENTENCE

The trial court erred in accepting the jury's death penalty verdict and in sentencing Kimber to death and this Court, in the exercise of its independent duty to review death sentences under §565.035 RSMo, should reduce Kimber's death sentence to life without probation or parole, because Missouri's death penalty scheme, both facially and as applied, violates the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the evidence was insufficient to support the sole aggravating circumstance the jury found; the evidence, including the state's misconduct at every phase, from jury selection forward, shows that Kimber's sentence was imposed because of passion, prejudice and other arbitrary factors; this Court's refusal to engage in meaningful proportionality review, including refusing to consider all similar cases, violates due process and does not comply with §565.035RSMo; Kimberly's daughter, Erica, requested that Kimber not be sentenced to death, and the actual shooter, Orthell Wilson, was sentenced to life without parole, and Kimber's sentence is thus excessive and disproportionate. All of these factors result in the arbitrary and capricious imposition of the death penalty.

Gregg v. Georgia, 428 U.S. 153 (1978);

Cooper Industries Inc. v. Leatherman Tool Group Inc., 532 U.S. 424 (2001);

State v. Martindale, 945 S.W.2d 669 (Mo.App.,E.D.1997);

U.S. Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENT

I. BATSON CHALLENGES IMPROPERLY DISALLOWED

The trial court clearly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #50—Ms. Evans, and #56—Mr. Burton, African-Americans, because the court's rulings denied them and Kimber equal protection and Kimber freedom from cruel and unusual punishment under the U.S.Const.,Amends.8,14 and Mo.Const.,Art.I,§§2,21 in that defense counsel made a prima facie case of discrimination by the state and the state's explanations for its strikes of Evans and Burton were pretextual. The state's explanation for striking Ms. Evans—that she distrusts the system, the courts, and prosecutors because of the treatment of her relative—was pretextual since Veniremember Tincu was a similarly situated white person who the state did not move to strike. The state's statement that Tincu was not similarly situated because she was not dissatisfied with the criminal justice system's treatment of her relative was not supported by the record. The state's explanation for striking Mr. Burton—that he was a postal worker—was also pretextual since Mr. Burton's employment with the postal service is unrelated to this case and therefore the "postal worker" explanation is code for African-American. Further, the state's explanation that they strike postal workers because they are members of a bureaucracy is pretextual since they did not strike similarly situated white jurors who also work for bureaucracies—the City of Clayton and the federal government.

Although Respondent acknowledges that in *Purkett v. Elem*, 514 U.S. 765 (1995), the Court outlined a three-step analysis for claims under *Batson v. Kentucky*, 476 U.S. 79 (1986), (Resp.Br.at22), he chooses to ignore the third step, hoping that this Court will not recognize the pretextual nature of the State's strikes of the two remaining African-Americans on the panel. At this third step, we must determine if the explanation for the strike is pretextual. *State v. Barnett*, 980 S.W.2d 297, 302 (Mo.banc1998). So, how do you show pretext? It can be shown if one or more similarly-situated white jurors were not struck, *State v. Parker*, 836 S.W.2d 930, 940 (Mo.banc 1992); if little or no logical relevance between the explanation and the case exists, *Id.*; if record support for the explanation is lacking, *State v. Butler*, 731 S.W.2d 265 (Mo.App.,W.D.1987); if the strike is based on an aspect of demeanor and it was not brought to the court's attention at the time it occurred, *State v. Metts*, 829 S.W.2d 585 (Mo.App.,E.D.1992), or if the explanation is implausible, fantastic or silly. *Purkett*, 514 U.S. at 768. Although *Batson* doesn't preclude exercising peremptories based on hunches, those hunches must be legitimate, not a ruse for discrimination.

Respondent asserts the court did not clearly err in denying the *Batson* challenge of Ms. Evans because her responses showed she would have difficulty in considering the full range of punishment and she and Veniremember Tincu were not similarly-situated. (Resp.Br.at26-30). Respondent misstates the record in asserting that Ms. Evans would have difficulty in considering the full range of punishment.

Respondent's citation to page 525 reveals that Mr. Cassell, not Ms. Evans, made the referenced statement. (Tr525). Ms. Evans, while understandably "very nervous"

about the prospect of deciding whether another human being would live or die, never stated she had any such difficulties and merely acknowledged she would do her best to follow the law.(Tr529-31). To suggest her views about the death penalty supported the prosecutor's peremptory strike lacks record support.

Second, the prosecutor's attempt to portray Ms. Evans as one opposed to the criminal justice system (Resp.Br.at25) to justify the strike is also not supported by the record. Evans stated that her niece's experiences had not made Evans emotional and she specifically stated that nothing about it would prohibit her from giving either side a fair trial.(Tr776-777). The prosecutor attempted to justify his strike by telling the court that Evans believed her niece had been treated unfairly by the police, was a victim and Evans thus distrusted the system.(Tr914-15). He then attempted to contrast Evans to Tincu, a white juror, saying Tincu had not felt her nephew was ill-treated by the system but only believed the system had been too lenient on someone else.(Tr915). Yet again, the State's rendition of the facts differs from reality since Tincu was upset because her nephew was treated "too harshly" and she wasn't 100% sure she could be fair to both sides.(T778-79). Since the record does not support the State's statements but reflects that, of the two jurors, Tincu had more problems with the judicial system than Evans, the State's excuses reveal its discriminatory purpose. *State v. Butler*, 731 S.W.2d at 271-72. The State's rationale was a pretext for purposeful racial discrimination.

Respondent's attempts to save the strike of Mr. Burton are similarly unavailing. First, Respondent argues the strike was not improper since the State also struck "similarly situated veniremembers"—one who worked for FedEx and one "whose spouse was a

postal worker."(Resp.Br.at31). The record reflects that Juror No.55, a white person, worked for FedEx but the spouse of Juror No.61 was a "letter carrier."(Tr918). Despite Respondent's gloss, "letter carrier" and "postal worker" are not necessarily identical. Further, neither juror, as even the State acknowledged at trial, was similarly situated.(Tr918).

Second, despite this Court's ruling in *State v. Smulls*, 935 S.W.2d 9 (Mo.banc 1996), finding no error in the State's peremptory strike of a postal worker, the stated rationale must be reviewed at the third step of the *Batson* analysis to see if the excuse is clear, reasonably specific and related to the case. *Batson*, 476 U.S. at 98, n.20. Employment status may, in appropriate cases, constitute legitimate, race-neutral reasons, but "the concerns regarding those factors must somehow be related to the factual circumstances of the case and the qualifications of the juror to serve on that case." *People v. Jones*, 636 N.Y.S.2d 115,117 (1996). Without that relationship, this kind of excuse "smacks of the kind of non-specific, subjective and racially suspect explanations which the Supreme Court hoped to obliterate via the *Batson* decision." *People v. Sims*, 618 N.E.2d 1083,1087 (Ill.App.,1993).

This Court must ensure *Batson's* promise is fulfilled—that no juror is struck because of the color of her skin. It must reverse and remand for a new trial.

II. VOIR DIRE UNREASONABLY RESTRICTED

The trial court abused its discretion in unduly restricting defense voir dire by precluding counsel from asking whether the jurors could seriously consider imposing a life without probation or parole sentence if the State proved that "Kimber Edwards and another killed his ex-wife, the mother of his child" because this ruling denied Kimber due process, a fair trial with a fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, by denying Kimber the ability to probe the jurors' views about this being the killing of "the mother of [Kimber's] child," Kimber could not explore a critical fact in the case and discover potential disqualifying bias. Since the state emphasized that Kimberly Cantrell was the mother of Kimber's child, Erica, throughout trial, Kimber suffered a real probability of injury.

Respondent claims no error occurred when voir dire was prohibited about whether the jurors would seriously consider a life-without-parole sentence, thus, whether they would be automatic-death penalty jurors, if they knew the State was alleging Kimber had contracted for the killing of his child's mother.(Resp.Br.at32). Respondent's theory is that the restriction only occurred during death qualification, not during general voir dire; the question would have been improper in death qualification, and, that Kimberly was the mother of Kimber's child was not a critical fact.(Resp.Br.at32).

Respondent first argues that, because the defense only attempted to ask this question during death qualification, not general voir dire, the trial court did not restrict all

voir dire.(Resp.Br.at36). This argument ignores the import of the court's ruling. The court told counsel "I think that portion of the question, the mother of his child, is inappropriate in voir dire."(Tr343). The court did **not**, as the Respondent would suggest, limit its ruling to death-qualification voir dire. Given its broad-reaching language, counsel could not be expected to believe it would change its mind later.

This situation is analogous to *State v. Baker*, SC84507 (Mo.banc, April 1, 2003), where this Court held that the defense's statement of "no objection" when evidence that had been the subject of a suppression motion was admitted did not waive the prior continuing objection. Rather, it was clear from the record that the defendant maintained the earlier objection. Similarly here, counsel should not be forced to object again after having just heard the court's apparently all-encompassing belief about the appropriateness of her question. The record with which counsel was faced clearly demonstrated what the court's ruling would be.

Respondent also argues counsel's question would have been improper during death qualification.(Resp.Br.at38-39). Since counsel sought to discover if knowledge of a particular fact would render jurors incapable of considering one of the possible punishments, essentially rendering them automatic-death penalty jurors, it is difficult to imagine a more appropriate question. *See Morgan v. Illinois*, 504 U.S. 719 (1992); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Finally, Respondent argues the defense was not denied voir dire on a "critical fact" under *State v. Clark*, 981 S.W.2d 143 (Mo.banc 1998). Respondent seems to suggest a critical fact is only a victim's extreme youth.(Resp.Br.at39-40). The question is whether

a fact has "substantial potential for disqualifying bias." *Id*. at 147. If it does, it must be divulged to the venire or risk reversal. Respondent cavalierly states that since the victim in this case was "merely the mother" of Kimber's child, (Resp.Br.at40), no risk existed of evoking the emotional response about which this Court was concerned in *Clark*. This ignores the State's repeated emphasis, in testimony and argument, that Erica, the child, no longer had a mother to guide and protect her.(Tr1190,1881,1932,2034, 2047,2048). The State sought to create emotion by focusing on the critical fact of the murder of the mother of Kimber's child. Yet, voir dire was prohibited on that very fact.

This Court must reverse and remand for a new trial.

III. KIMBER'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The trial court erred and clearly erred in overruling Kimber's motion to suppress statements and admitting those statements into evidence because these rulings denied Kimber due process, a fundamentally fair trial, right to silence and non-incrimination and freedom from cruel and unusual punishment guaranteed by the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that Kimber was a suspect in Kimberly's death and was subjected to a custodial interrogation in the early morning of August 24, 2000. The interrogation was highly coercive, since the officers brought Kimber's wife and three children to the station that night; separated Kimber from his wife and his children; took fingerprints, shoeprints, hair samples and photographs of his wife and instituted proceedings to place custody of his daughter Erica in DFS, removing her permanently from Kimber's custody that night. Kimber's statements were obtained because of the coercive environment and were thus involuntary, since the officers threatened to bring his wife and remaining children back to jail for more questioning unless he agreed to tell them what they wanted to hear. Kimber's statements were also involuntary because he invoked his right to counsel once he was a suspect in this case, after the initial custodial interrogation, but before he made any statements and did not initiate the contacts with police officers who ultimately obtained his statements.

Respondent asserts Kimber's statements were voluntary, the police used no coercion to obtain them and he did not request counsel.(Resp.Br.at41). Respondent

builds his argument upon the premise that this Court must defer to all of the trial court's findings.(Resp.Br.at41-42). While deference is afforded that court's factual findings, this Court must review application of those facts to the law *de novo*. *State v. Taber*, 73 S.W.3d 699, 703 (MoApp.,W.D.2002). And, therein lies the rub since the question of whether a statement is voluntarily made requires applying the facts to the law. *United States v. Unser*, 165 F.3d 755, 767 (10th Cir.1999).

Respondent asserts Kimber, his wife and his children "voluntarily" agreed to go with the multitude of officers who arrived at and entered his home at 3 a.m., (Resp.Br.at43); "allowed" the police to photograph and fingerprint them, and "voluntarily" agreed to have hair samples and shoeprints taken.(Resp.Br.at44). Respondent further asserts they were never treated as suspects, since they were never placed in handcuffs nor were guns drawn.(Resp.Br.at43-44). This Court's *de novo* review will demonstrate that these assertions will not withstand scrutiny.[1]

Nothing about the circumstances surrounding Kimber's contacts with the police lead to a conclusion of voluntariness. Rather, all of the facts—from the initial contact, in the middle of the night, coming upstairs to the family's bedrooms, to the separation of parents from children on the way to the station, at the station and then the removal of one child from their custody after hearing her screams, to threats to again bring in his wife

[1] Also not withstanding scrutiny is Respondent's misrepresentation of the text of Appellant's brief.(Resp.Br.at49). Respondent inaccuracy in reporting is manifested by his resort to elipses in order to reach his desired interpretation.

and children for questioning if he did not give them what they wanted—demonstrate the psychological coercion used to obtain statements. To suggest Kimber and his family would not have felt threatened by what the police did ignores reality. Further, to suggest Kimber was not considered a suspect ignores the State's own evidence.(ExhT;Tr82-83,94-95,1304,1504-05,1886). A reasonable person in Kimber's position would have understood he was not free to leave, *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), since he and his family were taken far from home, in the middle of the night, with no way to return, were treated as suspects by being photographed and fingerprinted and were being questioned by police in rooms used for custodial interrogations. The totality of the circumstances demonstrates Kimber was a suspect.

Finally, Respondent suggests the trial court was justified in ignoring the uncontroverted evidence that Kimber invoked his right to counsel because the evidence was not elicited during the initial suppression hearing but rather came out during the offer of proof.(Resp.Br.at50-51). Respondent apparently operates under the same misapprehension as the trial court—that all evidence dealing with suppression must be presented at the time of the suppression hearing. Not so. A ruling on a motion to suppress is interlocutory, and thus subject to change throughout trial. *State v. Burge*, 39 S.W.3d 497, 499 (Mo.App.,S.D.2000). A trial court bases its decision on evidence from the suppression hearing as well as evidence from the trial itself. *State v. Finster*, 985 S.W.2d 881, 887 (Mo.App.,S.D.1999). The court should have considered this evidence since it would have provided an additional, viable basis for suppressing the statements.

This Court must reverse and remand for a new trial.

IV. NON-TESTIFYING CO-DEFENDANT'S STATEMENTS ADMITTED

The trial court erred in admitting, over objection, through Officers Whitley, Coleman, Gage and Siscel, the statements of Orthell Wilson, Kimber's non-testifying co-defendant who actually shot Kimberly Cantrell and whose statements implicated Kimber and further erred in denying Kimber's request for instructions limiting the officers' testimony to explain their subsequent conduct and not for the truth of what Orthell told them because those rulings denied Kimber due process, the right to confront witnesses against him, a fundamentally fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, while the state asserted that the officers' testimony was intended to show "what they did next" it was solely introduced to show that Orthell had confessed to killing Kimberly and had implicated Kimber and, since Orthell did not testify, Kimber was denied the right to confront him and challenge his statements implicating Kimber in the crime.

The Respondent asserts no error resulted from admitting evidence of Orthell's statements at trial because first, the defense did not preserve the objection, (Resp.Br.at63-64), and second, "the detectives never once repeated a statement Orthel made to them." (Resp.Br.at64). Both assertions are inaccurate.

Pre-trial, the parties stipulated that "any objections to hearsay will be understood to include and preserve an objection that the evidence complained of violates defendant's right to confront and cross examine witnesses against him under the Sixth and Fourteenth

Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution."(LF400). Thus, the defense objection sufficiently preserved the constitutional claim.

Contrary to Respondent's assertions, the officers testified directly about what Orthell, who did **not** testify, had told them. Detective Siscel testified, over objection, that he and Detective Gage went to a specific house because "Mr. Wilson told us that that's where he hid the murder weapon."(Tr1344).[2] He later reiterated, "Mr. Wilson told us he hid the murder weapon in that vacant building."(Tr1344-45). Detective Gage testified that he and Siscel were told to go to a building to retrieve a handgun, which "we found [] on the direction of Orthel Wilson."(Tr1470-76).

The State also argued Orthell's statements to the officers. In guilt phase opening, the prosecutor stated that Orthell "speaks with the police and he leads the police to a location directly across the street from 2101 Palm, … and they find hidden in a bag a pistol."(Tr951-52). And again, he stated that the officers told Kimber "hey, we spoke to Orthel and he says there is no Michael." (Tr955).

If, as Respondent states, the "State took great pains to avoid presenting testimony about any of Orthel Wilson's out-of-court statements" (Tr64), it was not successful. The jury heard Orthell's statements through the officers, yet never had an opportunity to judge his credibility. And, since Orthell's statements were vital to connect Kimber to

[2] The defense objected and requested a limiting instruction, which the court also denied. (Tr1344).

Kimberly's death, their admission was not harmless error. This Court must reverse and remand for a new trial.

V. REFUSAL TO GIVE NO-ADVERSE-INFERENCE INSTRUCTION

The trial court erred in refusing to give Instruction D, the no-adverse-inference instruction, patterned after MAI-Cr3d308.14, in penalty phase because this ruling denied Kimber due process, a fundamentally fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that, although Kimber testified in guilt phase, he did not testify in penalty phase and, when counsel requested that the court instruct the jury that it could not draw any adverse inference from Kimber's failure to testify, the court refused. The failure to give that instruction inescapably impressed on the jury's consciousness that Kimber had not testified and left it free to consider that fact in making its penalty phase decision.

For the third time, the Respondent comes before this Court attempting to justify a trial court's refusal to give, upon request, the no-adverse-inference instruction in penalty phase. Here, despite this Court's clear statements of the controlling law in *State v. Storey*, 986 S.W.2d 462 (Mo.banc1999) and *State v. Mayes*, 63 S.W.3d 615 (Mo.banc2002), the trial court opined that MAI-Cr3d 308.14 applies only to guilt phase and invited this Court to tell him if he erred in refusing to give such an instruction in penalty phase.(Tr2093). Respondent asserts the trial court did not err[3] and this Court

[3] Respondent seems to suggest that the giving of the instruction is optional, even upon request, despite this Court's clear admonitions to the contrary, and the Notes on Use to the MAI's. ("…both of which hold that a modified no-adverse-inference instruction

should not accept his invitation, asserting the instruction proffered was misleading and, even if the failure to instruct was error, it was harmless beyond a reasonable doubt.

Respondent takes issue with proposed Instruction D, which read: "Under the law, a defendant has the right not to testify. No presumption may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify."(LF492). This instruction was identical to that offered in *State v. Storey*, *supra*, a case in which the defendant did not testify in the penalty phase re-trial. Respondent asserts this language would have "confused and misled" the jury because Kimber had testified in guilt phase. (Resp.Br.at71). At best, such an argument is circuitous. At worst, it suggests that this capital jury was incapable of rational, logical thought.

Kimber testified in guilt phase.(Tr1802-80). Therefore, the jury did not receive a guilt phase no-adverse-inference instruction. The jury presumably considered his testimony in reaching its guilt phase verdict. Kimber did not testify in penalty phase. Thus, had the jury received Instruction D, to what "failure to testify" would they logically believe that admonition applied? Perchance to that phase which they had just heard? The Respondent attempts to further muddy the waters by suggesting that the jury would have been further confused by Instruction D since they were told that they could consider all of the evidence from the first phase, which would have included Kimber's testimony. (Resp.Br.at72). Yet again, Respondent's argument presumes the jury is incapable of

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should be given during the penalty phase…"). Despite Respondent's suggestion, the giving of the instruction is mandatory, not discretionary.

reading and then applying the English language. It also has been rejected by this Court in *State v. Mayes*, 63 S.W.3d at 638. The Respondent attempts to equate the jury's proper consideration of evidence from the guilt phase—including Kimber's testimony—with its improper consideration of his **failure** to testify. Clearly, the one instruction tells the jury what it **may** consider. The other tells the jury what it constitutionally **may not**. Instruction D properly set forth the law and would not have confused or misled the jury.

The Respondent next seems to suggest that the giving of a no-adverse-inference instruction was not mandatory here, citing *Knese v. State*, 85 S.W.3d 628 (Mo.banc2002), as support. (Resp.Br.at74). As this Court has stated, if requested, the instruction **must** be given. *State v. Storey*, 986 S.W.2d at 464; *State v. Mayes*, 63 S.W.3d at 640.

The only real issue before this Court is whether the error in failing to give the instruction was harmless. The State has not met its burden of showing it to be harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Mayes*, 63 S.W.3d at 636. The Respondent's argument is that, since Kimber testified in guilt phase and proclaimed his innocence, no harm can result from the failure to give the instruction.(Resp.Br.at75-82). This argument is based upon the false premises that the only issue in penalty phase is guilt/innocence and that the jury must vote for death if it believes that the defendant did the crime. Neither premise is valid.

Section 565.030RSMo codifies the procedures to be followed in a death penalty case. It provides that, if the trier of fact finds the defendant guilty of first degree murder in the first phase, it will then proceed to a punishment phase, at which "evidence in aggravation and mitigation of punishment, including but not limited to evidence

supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials." The governing statute itself thus clearly provides that more than guilt or innocence is to be considered in penalty phase.

As this Court repeatedly has noted, the jury is never required to impose death. *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc2002). It can choose life for any reason or no reason at all. *State v. Storey*, 986 S.W.2d at 464; *State v. Mayes*, 63 S.W.3d at 637. Thus, even if it is convinced of a defendant's guilt, it will not necessarily choose death, and indeed, it is never required to. In this case, the evidence in mitigation of punishment was substantially greater than that adduced in *State v. Mayes*, *supra*, and the jury found only one statutory aggravating circumstance.(LF494). As this Court stated in *State v. Mayes*, "while the strength of the State's case can be an important factor in determining whether an error is harmless, it cannot be the deciding factor…." 63 S.W.3d at 637. The prejudice against Kimber, who chose to invoke his privilege against self-incrimination, is "not purely speculative as the State suggests." *State v. Storey*, 989 S.W.2d at 464-65, *quoting, Carter v. Kentucky*, 450 U. S. 288, 301 n.18 (1981).

The Respondent's argument is, in essence, that a defendant must make the Hobson's Choice of asserting his innocence or ensuring the jury does not hold his failure to testify against him. Such a theory denigrates these basic, fundamental constitutional rights. This Court must reverse and remand for a new penalty phase.

VII. COMMENTS ON FAILURE TO PLEAD GUILTY

The trial court erred and abused its discretion in overruling Kimber's objections to repeated statements about Kimber's failure to plead guilty to criminal non-support because those rulings violated Kimber due process, to be tried solely for the pending charge, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the comments encouraged the jury to convict Kimber of first degree murder based on his failure to plead guilty to another offense, and thus used his exercise of his constitutional rights in another case to suggest guilt in both cases.

Respondent asserts that no error resulted from the State's repeated references to Kimber's exercise of his constitutional right to go to trial and not plead guilty to the offense of criminal non-support. It asserts first, that Kimber's failure to plead guilty is evidence of his motive to kill and second, that his failure to plead is not a "bad act" or "uncharged crime."(Resp.Br.at89). Both assertions lack merit.

Evidence of the non-support case may have been relevant, and thus admissible, given that the State alleged, as a statutory aggravator, that "Kimberly Cantrell was a witness in a pending prosecution in St. Louis County Circuit Court Cause Number 00CR-990, State of Missouri vs. Kimber Edwards, the charge of Criminal Non-Support, a class D felony and was killed as a result of her status as a witness."(LF485). However, evidence that Kimber had exercised his constitutional rights was neither relevant nor admissible. The State impermissibly encouraged the jury to penalize Kimber for having exercised those rights. *See State v. Bannister*, 680 S.W.2d 141, 147 (Mo.banc 1984);

Griffin v. California, 380 U.S. 609 (1965). It is significant that the inordinate prejudice that these references caused could have been avoided easily by referring only to the on-going nature of the non-support case, rather than Kimber's exercise of his constitutional rights.

The State encouraged the jury to believe that the exercise of one's constitutional rights was something to be condemned, like a prior bad act. This cannot be condoned. This Court must reverse and remand for a new trial.

VIII. FAILURE TO DISCLOSE DEFENDANT'S STATEMENT

The trial court abused its discretion in denying the defense request for a mistrial when Detective Brady testified that Kimber had told him "it's not his business. He had nothing to do with it" because this ruling denied Kimber due process, a fair trial, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,,Art.I,§§10,18(a),21 and violated Rule 25.03 in that the state failed to disclose this statement by Kimber, despite discovery requests under Rule 25 and §565.005 RSMo, and the state used the statement to portray Kimber as uncaring and unremorseful about Kimberly's death.

Although Respondent now apparently acknowledges that the State failed to disclose a statement Kimber made to officers on August 24, 2000, (Resp.Br.at97-100), it asserts that no relief is warranted because he requested a mistrial, not some lesser kind of relief.(Resp.Br.at99-100). Respondent's argument is unavailing.

When counsel objected to the State's failure to disclose and moved for a mistrial, the court rejected the State's claim that no mention of a statement had been made, instructed the jury to disregard, but denied the defense request for a mistrial.(Tr1192). Counsel reiterated the objection, noting that the instruction to disregard would not cure the prejudice since the damage had already been done.(Tr1193). Thereafter, in both closing arguments, the prosecutor built his case upon Kimber's undisclosed statement, telling the jury first, that the statement, allegedly made nonchalantly, established the cool reflection necessary to convict of first degree murder, and second, that it proved his cold-

heartedness and the need for death.(Tr1887-1892-93,2031-33,2048). Given the State's late disclosure and its subsequent extensive use of the statement, only a mistrial would have cured the prejudice.

As Judge Somerville noted in a first degree robbery case when the State introduced hearsay statements of a non-testifying co-defendant, "When inadmissible evidence saturates the state's case with prejudice it cannot always be purged by the simple expedient of instructing a jury to disregard it." *State v. Rayner*, 549 S.W.2d 128, 133 (Mo.App.,W.D.1977). The real question is "How do you unring a bell?" *Kansas City v. Peret*, 574 S.W.2d 443 (Mo.App.,W.D.1978). And, even more importantly, once the bell has been rung, can it be "un-rung" by ringing it again? Telling a jury to ignore what they just heard is like telling a small child not to put beans up his nose. Any parent who issues such a admonition will soon find herself sitting in the emergency room while those beans are removed from her child's nose.

Defense counsel knew that danger and told the court that the bell could not be un-rung. The claim is not waived by counsel's insistence that only declaring a mistrial would remedy the prejudice caused by the State's misconduct. This Court must reverse and remand for a new trial.

XII. DISPROPORTIONATE SENTENCE

The trial court erred in accepting the jury's death penalty verdict and in sentencing Kimber to death and this Court, in the exercise of its independent duty to review death sentences under §565.035RSMo, should reduce Kimber's death sentence to life without probation or parole, because Missouri's death penalty scheme, both facially and as applied, violates U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the evidence was insufficient to support the sole aggravating circumstance the jury found; the evidence, including the state's misconduct at every phase, from jury selection forward, shows that Kimber's sentence was imposed because of passion, prejudice and other arbitrary factors; this Court's refusal to engage in meaningful proportionality review, including refusing to consider all similar cases, violates due process and does not comply with §565.035 RSMo, and Kimberly Cantrell's daughter, Erica, requested that Kimber not be sentenced to death, and the actual shooter, Orthell Wilson, was sentenced to life without probation or parole, and Kimber's sentence is thus excessive and disproportionate. All of these factors result in the arbitrary and capricious imposition of the death penalty.

This Court is charged with "compare[ing] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensuring a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978). Even if this Court

disagrees with the claims of error raised elsewhere in this and Kimber's opening briefs, it must still determine, considering the crime, the nature and strength of the evidence, the specific errors at trial and the defendant himself, whether the death sentence violates Kimber's rights to due process, freedom from cruel and unusual punishment, reliable sentencing and proportionate sentencing. U.S. Const., Amends.V,XIV,VIII; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-43 (2001); *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. ___(April 7, 2003)(to determine whether a monetary punitive damage award is excessive, the Fourteenth Amendment's Due Process Clause requires reviewing courts to consider penalties imposed for comparable misconduct and the reviewing court may not uphold the penalty on the grounds that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal).

Respondent states that nothing in the record suggests that Kimber's death sentence was imposed under the influence of prejudice, passion or any other improper factor. (Resp.Br.at124). In issuing this blanket statement, Respondent ignores, *inter alia*, the prejudicial impact of the State's improper arguments in penalty phase in which he repeatedly told the jury that Kimber must be sentenced to death because if he were not, witnesses in criminal cases would forever be at risk and the system would break down. (Tr2035). Yet, the United States Supreme Court has recently held that penalties exacted for general conduct and not conduct specifically directed against the particular victim are disproportionate and cannot stand. *State Farm Insurance, slip op.* at 9. The Court further

held that due process will not permit such hypothetical claims to be upheld against a defendant. *Slip op.* at 12. Just as the defendant in *State Farm* could not be subjected to punitive damages for actions taken against others in other jurisdictions, so, too, Kimber should not be held responsible and subjected to a death sentence because of the jury's fears that witnesses in other criminal cases will never be safe were Kimber not executed for this crime. Errors such as those created by the State's arguments undermine confidence in Kimber's death sentence.

Meaningful proportionality review, in which this Court considers all other "similar" cases, not merely those in which a death sentence was imposed, is required by the Eighth and Fourteenth Amendments. *Cooper Industries, Inc., supra; BMW, supra; State Farm Insurance, supra*. "Similar" cases must include cases with similar facts, regardless of the sentence that is ultimately imposed. *BMW*, 517 U.S. at 583-85. Consideration of cases such as *State v. Martindale*, 945 S.W.2d 669 (Mo.App.,E.D.1997), in which the defendant hired her boyfriend to kill her husband and was subsequently convicted of second degree murder and sentenced to fifteen years, is constitutionally required.

This Court should set aside Kimber's sentence and resentence him to life imprisonment with no possibility of probation or parole.

CONCLUSION

Based on the foregoing arguments and those in his opening brief, Kimber requests that this Court reverse and remand for a new trial, for a new penalty phase, or vacate his death sentence and re-sentence him to life without parole.

Respectfully submitted,

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Janet M. Thompson
Attorney for Appellant
3402 Buttonwood
Columbia, MO 65201-3724
(573)882-9855 (telephone)
(573)884-4921 (fax)
jthompso@mspd.state.mo.us

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2003, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

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Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 7,402 words, which does not exceed the 25% of the total words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson